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No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1983

JAMES E. SAUNDERS, PRO SE

v.

JOHN MARSH, SECRETARY OF THE ARMY

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES E. SAUNDERS, Pro Se
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Department of the Army's employment decision was based on a legitimate decision, and was it true or was it a pretext?
2. Did the district court err in its oral decision based on my claim that the selectee had no documented instructional experience?
3. Whether the district court should have included a written opinion in its oral decision.
4 Whether the district court's oral decision is in conflict with McDonnell Douglas Corp. v. Green, 411 US 792, 93 S. Ct. 1817, 36 L. ED 2d 668 (1973).
5. Whether the district court's decision is in conflict with Sweeney v. Board of Trustees of Keene State College, 659F 2d 169 (1978) doctrine

pertaining to individual disparate treatment claims.

6. Whether the district court should have required proof of the selection criteria that the Department of the Army stated that the selection was based upon.

7. Whether the district court's oral decision is in conflict with Deborah Ann Katz v. Elizabeth Dole, Secretary of Transportation, decided June 1, 1983 by the Fourth Circuit.

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RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OFFICIAL REPORT IN EARLIER PROCEEDINGS

The opinion of the United States District Court for the Eastern District of Virginia dismissing the action appears in the appendix to this petition (App. A).

The opinion of the United States Court of Appeals for the Fourth Circuit also appears in the appendix to this petition (App. B) unpublished.

The denial of the petition for a rehearing also appears in the appendix (App. C).

STATEMENT OF JURISDICTION

On June 20, 1983, the District Court of Alexandria, Virginia entered an oral judgment dismissing the action. On December 21, 1983, the Fourth Circuit Court of Appeals for the Eastern District of Virginia affirmed the decision by the district court.

On January 25, 1984, my petition for rehearing was denied.

The jurisdiction of this court is envoked under Title 28, USCA, Section 1251 et seq.

This case was brought in the District Court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 E seq.

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 USC 2000 E-16, Passim, Public Law 95-454 5 USC 2302 states: that any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with to such authority, discriminate for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin and on the basis of age as prohibited under sections 12 and 15 of the age discrimination in Employment Act of 1967 (29 USC 631, 633a).

STATEMENT OF THE CASE

Since this case arises out of James E. Saunders, a very well qualified male, age 53, and a female, well qualified under age 40, the agency decided that

the way to break the tie was to select the person with instructional experience in the computer field. The agency selected the female. The Department of the Army gave as its nondiscriminatory reason for their selection was that the selectee had greater instructional experience. However, the agency's own EEO counselor stated, after his investigation, that the selectee had no documented instructional experience in her civilian personnel record, and that Mr. Saunders had instructional experience. He concluded that there were inconsistencies in the selecting officials' statements as to the reasons for selecting the female.

I filed a claim under 42 USC 2000 E, et seq., based on age and sex discrimination. The trial court entered judgment in favor of the defendant without

a written opinion.

The trial court ignored my claim of disparate treatment, as explained in McDonnell Douglas Corp. v. Green, 411 US 792 (1973). The Fourth Circuit Court of Appeals affirmed.

The above claims were pointed out in my opening statement to the court and in the closing argument.

To the Court

In my reply brief, November 17, 1983, first paragraph, I pointed out that the Department of the Army intentionally fabricated the selectee's credentials and the court failed to view the unlawful act as a pretext.

In my petition for rehearing, December 29, 1983, I pointed out that the law of disparate treatment was overlooked, as explained in McDonnell Douglas Corp. v. Green.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision by the District Court and affirmed by the Fourth Circuit Court of Appeals departs from the traditional analysis of an individual disparate treatment claim, as explained in McDonnell Douglas Corp. v. Green. The decision by the District Court is a significant departure from the principals enunciated by this court in the Texas Department of Community Affairs v. Burdine. The court stated, 450 US at 252: in McDonnell Douglas v. Green, 411 US 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in

proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection", Id. at 802. Third, should the defendant carry this burden, the plaintiff then must have an opportunity to prove by a preponderance of evidence that the legitimate reasons offered by the defendant were not its true reason but were a pretext for discrmination. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. This court, in granting Certiorari in the Board of Trustees of Keene State College, et al. v. Sweeney, 429 US at 24 stated: this court stated in Furnco Construction Co. v. Waters, 438 US 567 (1978), we stated that "to dispel the

adverse inference from a prima facie showing under McDonnell, the employer need only to articulate some legitimate, nondiscriminatory reason for the employee's rejection, Id. at 578, quoting McConnell Douglas Corp. v. Green, 411 US 792, 802 (1973). We stated in McDonnell Douglas that the plaintiff "must be afforded a fair opportunity to show that the employer's stated reason for the plaintiff's rejection was in fact a pretext, Id. at 804.

This court stated in Washington v. Davis that discriminatory intent is an essential element of a claim based upon the equal protection clause of the fourteenth amendment, the Supreme Court recognized that circumstantial evidence was one means of proving purposeful discrimination. The burden of establishing a prima facie case of

disparate treatment is not onerous. The plaintiff must prove by a preponderous of evidence, is that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. The prima facie case serves as an important function in the litigation, it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection.

The prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer discriminated against the employee. If the trier of fact

believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. The impermissible factor in the present case was that the defendants lied when they stated that the selection was based on the selectee having greater instructional experience. This lie indeed infers discriminatory intent, based on the fact that she had no instructional experience.

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was motivated by the

proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through introduction of admissible evidence, the reasons for plaintiff rejection. In the present case, the defendant's reason that was put forth for my rejection was indeed a pretext and is indefensible. This is supported by the defendant's silence. The defendants have not articulated a nondiscriminatory reason for stating that the selection was based on her greater instructional experience when, in fact, she had no documented instructional experience. Muller v. U.S. Steel stated that the law is clear that the plaintiff need not prove a specific intent to discriminate, it

is sufficient that the employer's conduct produced discriminatory results.

Under direct cross examination, the alleged discriminating official was asked to show proof of the selectee's documented instructional experience; he could not produce any evidence, therefore losing his credibility. The district court ignored the fact that the selecting official could not show proof of the qualification that he stated the selection was based on.

This court stated in Texas Department of Community Affairs v. Burdine, 450 US at 2564, it is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence,

the reasons for the plaintiff rejection. The Department of the Army's reason for plaintiff rejection was that the selectee had greater instructional experience. There is no evidence to support their claim. It is to be noted that they have remained silent on presenting evidence of their nondiscriminatory reason that the selection was based on. (emphasis added)

Under the McDonnell Douglas test, this court has explained that when a defendant is silent the court must enter judgment in favor of the plaintiff. It was brought out in my deposition, May 2, 1983, that the selectee did not have the qualification that the Department of the Army based their selection.

On page 95, line 15 of the deposition, I stated that their legitimate reason was not true. Documented evidence

obtained from the agency's own equal employment counselor and presented as evidence verified the fact that the selectee did not have the qualification that the Department of the Army based their selection. The counselor's document did show that I had instructional experience.

The selecting supervisor was made aware of my instructional experience at the interview. The Fourth Circuit Court stated in Deborah Ann Katz v. Elizabeth Dole, Secretary of Transportation, decided June 1, 1983, "our review of this appeal is hampered by the lack of any written opinion. The court's findings of fact and conclusion of law were delivered orally immediately after the trial, and are exceedingly laconic. The record, however, demonstrated clearly that the events

of which she complained took place." Possibly the most difficult problem with the district court's oral opinion, and the fourth circuit's affirmness, is how the court can rationally explain the dismissing of the complaint, when the evidence shows proof that their nondiscriminatory reason was untrue. Moreover, I was not given credit for my instructional experience and the selectee was given credit when, in fact, there was no documented proof of the selectee having instructional experience.

I feel that the Fourth Circuit Court of Appeals should have addressed the question of disparate treatment as it did in Katz v. Elizabeth Dole, Secretary of Transportation, decided June 1, 1983. This court has stated that disparate treatment claims are most easily understood; it is when a

person is treated differently. I suggest to this court that the defendant did lie about the selectee having greater instructional experience in order to give her the advantage over me. This court should view this lie as a pretext for discrimination.

CONCLUSION

James E. Saunders, petitioner, urges this court to grant the Writ of Certiorari. Despite the district court's oral opinion, the evidence I presented was a genuine issue of the defendant's intent. Mr. Justice Stevens has stated, in his dissent in Board of Trustees of Keene State v. Sweeney, the employer's burden is satisfied if he simply explains what he has done or produced evidence of what he has done. The defendant did not articulate a legitimate reason

for fabricating the selectee's credentials, nor did they produce evidence of the skills that they based their selection of the selectee over me. I suggest to this court that the defendant did falsify the selectee's credentials to give her an advantage over me. If not, why would he lie about the selectee's credentials? (emphasis added)

If the district court's oral opinion and the affirmation by the Fourth Circuit Court of Appeals is allowed to stand, the selection process based on competitiveness and merit is mute. Mr. Justice Stevens stated in his dissent, in the above case, that whenever this court grants certiorari and vacates a court of appeals judgment in order to allow that court to reconsider its decision of this court, the court is acting on merit. I urge this court

to assume jurisdiction based on the fact that the defendants lied intentionally, and the fact that the district court did not consider my claim of disparate treatment. It is clear that the district court's oral opinion is in conflict with the doctrine of McDonnell Douglas Corp. v. Green. I urge upon this court to reverse the opinion of the district court, affirmed by the Fourth Circuit Court of Appeals, based on the fact that the defendants have not presented a scintilla of evidence to show proof that by lying about the selectee having instructional experience was not a pretext for discrimination.

The district court in its opinion, page 5, line 20, cast a shadow of doubt in fundamental fairness when it states that "maybe the selecting official was wrong in stating that Ms. Weems had

more and better experience in the ICBOSS system and her instructional background was superior and that she came across as an instructor of people, that she was going to have to deal with being able to get across better than the plaintiff, Mr. Saunders. Maybe he was wrong in that. I don't think he was."

I submit to this court that I presented evidence to the district court that showed proof that I had been an instructor in ICBOSS and other systems at the request of the director of the agency. Moreover, I was given a letter of appreciation for my instructing ability, which was also received as evidence. The selectee, Ms. Weems, had no such experience; therefore, the district court, by casting that cloud, should have requested the proof of the selectee's instructional experience,

and not assume that the selectee might have the greater instructional background, which was given as the reason for my nonselection. The court's avoidance of this issue is lacking in fundamental fairness. I have met the burden of showing that the nondiscriminatory, legitimate reason that the Department of the Army gave for my nonselection was untrue, and certiorari should be granted.

The record clearly shows that I had more experience in the computer science field than the selectee. The record showed proof that I had more training in the computer science field than the selectee. Moreover, the investigation by the agency's EEO counselor stated that my record did show that I had teaching experience and that the selectee had no such

experience. The record clearly showed that I had experience with five or six different computer systems including ICBOSS. The above information was presented to the district court as exhibit 1. The District is in error when it states on page 5, line 19 of its oral decision: that Mr. Fowler wanted someone with instructional background and experience in the ICBOSS system. The district court in its oral decision admits that we both had experience in the ICBOSS system. Evidence introduced in exhibit 1 shows that we both were trained in the ICBOSS system at the same time with the same amount of hours of training with the same instructor. We both worked with the ICBOSS system. It is inconceivable how the lower court could have arrived at the determination that

the selectee had more experience in the ICBOSS system. The facts do not justify the court's oral determination. There was no evidence introduced at the trial to support the lower court's determination that the selectee's instructional background was superior to mine. The selectee had no instructional background. The record clearly supports my claim of superior qualifications with instructional experience in data processing. Therefore, certiorari should be allowed.

JAMES E. SAUNDERS,
Pro Se

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JAMES E. SAUNDERS, Plaintiff,	:	
-vs-	:	CIVIL ACTION NO. 82-0144-A
JOHN MARSH, Defendant.	:	

Monday, June 20, 1983
Alexandria, Virginia

Transcript of the Court's ruling in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge, United States District Court

APPEARANCES:

FOR THE PLAINTIFF:

JAMES E. SAUNDERS, Pro Se
6728 13th Place, N.W.
Washington, D. C. 20012

FOR THE DEFENDANT:

NASH W. SCHOTT, ESQUIRE
Assistant United States Attorney
701 Prince Street
Alexandria, Virginia 22314

THE COURT: As the stipulation of facts, which is extensive and commendably so by the parties, shows this case arises out of the rejection of a nonappointment, nonselection of the plaintiff as a G.S. 11 on April 17, 1979, to a position that was given to Mrs. Weems, who is a 30-year-old black woman. He, who is or was then 53 years old, complains that his nonselection was based on his sex and his age.

As counsel for the defendant and the plaintiff recognize, the allocation of proof in cases like this are, first, a determination of whether the plaintiff has made out a prima facie case of sex or age discrimination. If he has, then the burden of coming forward with some evidence which articulates a legitimate, nondiscriminatory reason for the action, is necessary before that prima facie

case can be overcome. And if such a legitimate, nondiscriminatory reason is articulated, then of course the plaintiff can show that the reason given is actually a pretext.

The burden, however, also rests upon the plaintiff to show in the case of sex discrimination, intentional discrimination and perhaps a lesser degree of willfulness on the age.

As far as the age discrimination is concerned, really an age discrimination prima facie is not particularly amenable to fitting in the McDonnell-Douglass prima facie case structure, but there are certain elements that must be proved. One, is the situation covered by the ADEA, which is true here; that the plaintiff is a member of the protected class, that is, that he was over 40,

which of course is true here; that he received an adverse agency decision on his employment request which is here.

But where the prima facie case of age fails in this case is that age was not a determining factor in the decision to select or not select Mr. Saunders. As far as age is concerned, there really hasn't been any prima facie case made out. Plaintiff's case must fail on any age discrimination.

Insofar as sex discrimination is concerned, to make out a prima facie case, the plaintiff must show that he was a member of the protected class, which being a male, he is; that he applied for and was qualified for a job for which his employer was seeking applicants. He has met that test; that despite his qualifications, he was rejected, and that after his rejection, the position

remained open.

I think probably he makes out a prima facie case on the question of gender discrimination.

As so the case then shifts to the defendant to again articulate a nondiscriminatory reason for not selecting Mr. Saunders.

I think where the plaintiff may be under a misunderstanding here is that the Court does not sit as an appeal board to determine who was the most qualified. All the Court's function here is to insure that whatever selection was made, it was not motivated even in part by an impermissible feature such as age or sex.

The Court does not have to decide and should not decide whether the selecting official, in this case Fowler, actually selected the best person.

That evidence is really only relevant in determining whether, if the reason is not a good one, whether the reason given is really pretextural as opposed to the legitimate reason for the nonselection.

Here, the selecting official has articulated a reasonable, nondiscriminatory, either on the basis of sex or age, reason for the nonselection of Mr. Saunders. Mr. Fowler wanted someone with instructional background and experience in the ICBOSS System. Both of the parties had some experience in both the features, but the selecting official legitimately felt that Ms. Weems had more and better experience in the ICBOSS System, that her instructional background was superior and that she came across as an instructor of the people that she was going to have to

deal with, being able to get across what she had to get across better than the plaintiff, Mr. Saunders. Maybe he was wrong in that. I don't think he was.

The evidence satisfies me that he was right in it, but even if he was wrong, that wrong will not support a case for sex or age discrimination, unless it is a cover-up, a pretext for nonselection of him because of those impermissible factors. They weren't a pretext. I find them to be sincerely given for the reasons that I have said.

Insofar as the Upward Mobility Program is concerned, they both had roughly the same experience and background with the ADP, but Mrs. Weem's courses were more pertinent to the job Fowler was looking for.

I find that the defendant

has articulated a reasonable, nondiscriminatory, nonpretextural reason for its nonselection of Mr. Saunders on the basis of both age and sex.

As to his specific contentions that he sets forth in paragraph 12 of his stipulation, (a) that he had greater instructional background than the selectee, Mrs. Weems, I don't find that to be the case. But, as I said, that isn't really the issue, not insofar as a Title 7 case is concerned.

He contends that the selecting official, Fowler, stated he was not permitted to select two people that he wanted for the position in question. That, it seems to me, gives Mr. Fowler more credibility than he would otherwise have. He admitted that he would like to have appointed Armstrong and Haberman, I think his name was; that he couldn't

because they were not as qualified as Mrs. Weems.

As far as the selecting official being unduly influenced to hire women for this position, that is just not borne out by the evidence in this case. Mr. Worthington's testimony surrounded the period '74, '75, and while a situation may have existed in those years where there was some emphasis on the appointment of women, there is no evidence from which the Court could find that that situation existed in this agency, in this division in April of '79 when the selection at issue was made.

What I have said, with the stipulation of facts will be adopted as the Court's findings of facts. On the basis of them, judgment will be entered in favor of the defendant and the action dismissed. I will prepare

the order.

MR. SCHOTT: Your Honor, I am concerned about one thing and perhaps the Court's--I am sure the Court's more aware of this than I am--but under a couple of cases that I have recently read from the Fourth Circuit, the most recent being one which is in our findings of fact and conclusions of law, Cuthbertson, and there is another case, Katz, is the Court going to prepare written findings of fact and conclusions of law?

THE COURT: No.

MR. SCHOTT: I wasn't sure if I was supposed to bring that to the Court's attention.

THE COURT: You brought it to my attention.

MR. SCHOTT: Thank you.

MR. SAUNDERS: Will it show

in your findings that I want to appeal?

THE COURT: The order will be entered today. If you want to appeal, you must give notice within 30 days.

Court is adjourned.

(Whereupon, at 1:20 o'clock p.m., court was adjourned.)

(Thereupon, the typing of the requested portion of the transcript was concluded.)

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fourth Circuit
No. 83-1798

James E. Saunders,

Appellant,

v.

John Marsh, Secretary
of the Army

Appellee.

Appeal from the United States District Court of the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (C/A No. 83-0144A)

Submitted: November 17, 1983

Decided: December 21, 1983

Before HALL and ERVIN, Circuit Judges and BUTZNER, Senior Circuit Judge.

(James E. Saunders, Appellant Pro Se. Nash W. Schott, Assistant United States Attorney for the Appellee.)

PER CURIAM:

James Saunders appeals from the district court's denial of relief in this action brought under 42 U.S.C. §§ 2000e et seq. Saunders claims that he was denied promotion because of his sex and age. The district court found that these factors did not prevent him from attaining the promotion.

The district court's factual findings are not clearly erroneous. Its application of the law was correct.

As the record and other materials before the court adequately present the facts and legal arguments, we dispense with oral argument and affirm for reasons stated by the district court.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 83-1798

James E. Saunders,

Appellant,

versus

John Marsh, Secretary of the Army,

Appellee.

ORDER

Upon consideration of the pro se appellant's petition for rehearing,

IT IS ORDERED the the petition for rehearing is DENIED.

ENTERED at the direction of Judge Butzner for a panel consisting of Judge Hall, Judge Ervine, and Judge Butzner.

For the Court,

/s/ William K. Slate, II

CLERK